



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 20, 2003

Ms. Terrie L. Hairston, RN, CHE
Executive Director
Board of Vocational Nurse Examiners
333 Guadalupe Street, Suite 3-400
Austin, Texas 78701

OR2003-8360

Dear Ms. Hairston:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191293.

The Board of Vocational Nurse Examiners (the "board") received a request for "any and all records contained in your files, including but not limited to complaints, disciplinary actions, certification status, registration history and renewal applications, and any other records which are available" concerning a named licensee. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we address the requestor's assertion that the board is late in requesting this ruling. The requestor contends that the board received this request on September 2, 2003. In its letter requesting a ruling from this office, the board states that "[w]e are unable to determine when we received the facsimile copy of the open records request dated September 2, 2003. We can verify that we received a copy of the open records request by regular mail on

¹In addition to the responsive information, you have submitted a document that was created after this request for information was received. Because this document, which we have marked, is not encompassed by this request, we do not address it in this ruling.

September 4, 2003.” We note that the faxed copy of the request itself reflects that it was sent “Sep-02-03 05:34P.” Because the request was sent after the close of business on September 2, it is considered received September 3. Ten business days following September 3 is September 17, which is the day on which the board requested a ruling from this office. We therefore conclude that the board was timely in requesting this ruling.

We turn now to the board’s arguments regarding the submitted information. The board asserts that portions of this information are confidential under federal law. Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision” and encompasses information made confidential by other statutes. You claim that some of the submitted information is not subject to release pursuant to regulations promulgated in accordance with the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”). *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. §§ 1320d-1320d-8. At the direction of Congress, the Secretary of Health and Human Services (“HHS”) promulgated regulations setting privacy standards for medical records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See id.*, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164. Under these standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. 45 C.F.R. § 164.502(a).

Section 160.103 defines a covered entity as a health plan, a health clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction covered by subchapter C, Subtitle A of Title 45. 45 C.F.R. § 160.103. In this instance, you have failed to demonstrate how the board is a covered entity under HIPAA. Consequently, we conclude that HIPAA is inapplicable to the submitted information, and it may not be withheld on that basis.

We turn now to your arguments under the Public Information Act. Because your claims regarding section 552.103 are the broadest, we address them first. This section provides:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A government body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the government body receives the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588.

In this instance, you state that the board "has compiled a record that will be utilized to establish certain statutory violations or grounds for disciplinary action against" the named licensee and that "[t]his information was compiled in anticipation of litigation." You also state "the informal disposition or litigation of this contested case is currently pending in this matter pursuant to [section] 302.411 of the Occupations Code" and that "further litigation of this contested case is anticipated before [the State Office of Administrative Hearings] pursuant to [section] 302.455 of the Occupations Code." Thus, we conclude that the board has shown that litigation, in the form of a contested case under the APA, was pending in this matter prior to the receipt of the present request for information. We further conclude that the submitted information relates to the pending litigation for purposes of section 552.103(a). Therefore, most of the submitted information may be withheld pursuant to section 552.103 of the Government Code.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Having reviewed the submitted information, we note that it includes records, which we have marked, that have either been obtained from or provided to the opposing party. Therefore, this information may not be withheld pursuant to section 552.103 of the Government Code.²

²We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that the records that may not be withheld under section 552.103 include medical records, access to which is governed by the Medical Practice Act (the “MPA”), Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). Medical records must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). Medical records may be released only as provided under the MPA. Open Records Decision No. 598 (1991). We have marked the information that constitutes medical records and may only be released in accordance with the MPA.

The records that may not be withheld under section 552.103 also include a licensee’s social security number. Section 552.101 also encompasses section 56.001 of the Occupations Code. Section 56.001 makes “[t]he social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency . . . confidential and not subject to disclosure under Chapter 552, Government Code.” Thus, the board must withhold the licensee’s social security number pursuant to section 552.101 of the Government Code.

We also note that the records that may not be withheld under section 552.103 include a Texas driver’s license number. Section 552.130 of the Government Code excepts from disclosure “information [that] relates to . . . a motor vehicle operator’s or driver’s license or permit issued by an agency of this state.” Pursuant to section 552.130, the board must withhold the information we have marked.

In summary, until such time as litigation has concluded, the board may withhold the submitted information to the extent the opposing party has not previously had access to it. The marked documents, to which the opposing party has previously had access, must be

released with the exception of medical record information, the licensee's social security number, and the licensee's Texas driver's license number.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

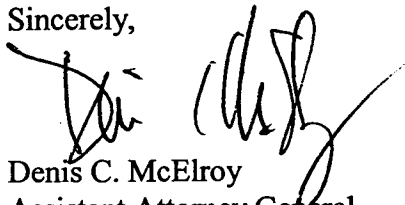
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 191293

Enc. Submitted documents

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